IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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FILED

KIMBERLY SMITH and MICHAEL B. HINKLEY, Individually and on Behalf of those Similarly Situated, Plaintiffs, v. MICRON ELECTRONICS, INC., a Minnesota Corporation, Defendant.	Case No. CV-01-244-S-BLW MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it a motion to strike consents and dismiss potential opt-in claimants. The Court heard argument on this motion on February 14, 2002, and took the matter under advisement. For the reasons expressed below, the Court will not strike the consents or dismiss the opt-in claimants, but will exclude from evidence any documents that they failed to produce, and will award fees and costs to defendants.

ANALYSIS

Plaintiffs Kimberly Smith and Michael B. Hinkley filed this suit under the Fair Labor Standards Act (FLSA) alleging that defendant Micron failed to pay overtime as required by that Act. Plaintiffs seek a Court determination that they may proceed with a collective action under the FLSA on behalf of similarly situated individuals. In anticipation that this action will be deemed a collective action, forty-six additional individuals have filed consents to join the

lawsuit.

Micron served subpoenas requesting documents on thirty-nine of the potential opt-in claimants in August of 2001. On September 4, 2001, this Court held a scheduling conference in which the parties agreed that (1) the subpoenas would be deemed to be requests for production of documents; and (2) all requests and the associated production of documents would go through, and be handled by, plaintiffs' counsel. The subpoenas sought documents that, among other things, would support the claimants' assertions that Micron committed violations of the FLSA.

On September 14, 2001, plaintiffs' counsel sent a response entitled "First Response to Request for Production of Documents" with corresponding documents on behalf of the two named plaintiffs and twenty of the claimants. The Response noted that three of the claimants had no documents.

That Response did not mention seventeen other claimants. Despite Micron's repeated requests, plaintiffs' counsel did not respond concerning these seventeen claimants until the date of the oral argument on the motion at issue here. At that argument, plaintiffs' counsel stated that he was willing to certify that his document production at that point was complete as to all claimants.

As a sanction for plaintiffs' failure to respond, Micron seeks to strike the consents of the claimants who ignored the subpoenas, and have those claimants dismissed from this case. Micron only seeks dismissal of thirteen of the seventeen claimants who ignored the subpoenas. This is because depositions were taken of four of those claimants, and they either produced documents or alleged they had none. With regard to those four claimants, Micron seeks only the fees and costs incurred in bringing this motion.

The Court finds that some form of sanction is appropriate. Plaintiffs' counsel waited almost six months before certifying, at oral argument, that his production was complete as to all claimants. That is simply unacceptable given the Court's understanding with counsel, set forth at the scheduling conference, that plaintiffs' counsel would treat the subpoenas as requests for the production of documents. The clear implication of that understanding was that plaintiffs' counsel would follow the dictates of Rule 34(b), the Rule that governs responding to requests for production, and which sets a thirty-day deadline for responding.

Having established that some sanction is appropriate, the Court must next determine the proper sanction. Generally, sanctions for discovery delays are set forth in Rule 37. Turning first to the sanctions listed in Rule 37(b), the Court has some question whether these sanctions apply as their application requires the violation of a Court order. The understanding between the Court and counsel at issue here was never memorialized by an order. Rule 37(d) also includes sanctions, but the failure to respond to requests for the production of documents is not included in that Rule's list of discovery violations that warrant sanctions.

A clearer source of authority lies in the Court's inherent powers: This Court is "invested with the judicial power of the United States [and has] certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. U.S.* 116 S.Ct. 1777 (1996). Certainly the Court has the inherent authority to place consequences upon parties and their counsel who do not follow through on understandings reached with the Court.

Micron asserts that the sanction of dismissal is proper. "Because the sanction of dismissal [for the failure to respond to discovery requests] is such a harsh penalty, the district

court must weigh five factors before imposing dismissal: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Porter v. Martinez*, 941 F.2d 732, 733 (9th Cir.1991) (citations and internal punctuation omitted). "The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a ... dismissal sanction. Thus the key factors are prejudice and the availability of lesser sanctions." *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir.1990).

To analyze the "key factors" identified by *Wanderer*, the Court must first identify the prejudice suffered by Micron. That prejudice includes the fees and costs it incurred by being forced to file a motion to learn that certain claimants had no documents. In addition, Micron could suffer future prejudice if claimants are allowed to offer into evidence documents that they failed to properly produce in response to Micron's subpoenas.

This prejudice does not necessarily require dismissal as a cure. The Court can remedy the prejudice by putting the parties in the position they would have occupied had plaintiffs responded within thirty days, *i.e.* by September 24, 2001,[1] that they had no documents. To put the parties in that position, the Court will exclude from evidence any documents that plaintiffs had in their possession on or before September 24, 2001, or which they could have obtained by that date through reasonable inquiry,[2] that fall within the definition of documents requested in the

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[1] The last subpoena was served on August 24, 2001, and so the last date for the claimants to file responses under Rule 34(b) was September 24, 2001.

[2] The phrase "reasonable inquiry" is drawn from Rule 26(g).

subpoenas. This sanction shall only apply to the thirteen claimants who ignored the subpoenas, and were not deposed. The Court will name the claimants who are affected by this sanction in the Order portion of this decision. In addition, the Court will award Micron the fees and costs it incurred in bringing the present motion.

These sanctions will alleviate the prejudice suffered by Micron without resorting to the more drastic remedy of striking the consents or dismissing claimants. For these reasons, the Court will grant Micron's motion in part, and deny it in part, consistent with the analysis in this decision.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to strike consents and dismiss potential opt-in claimants (docket no. 65) is hereby GRANTED IN PART AND DENIED IN PART.

IT IS FURTHER ORDERED, that the motion is granted to the extent it seeks to exclude from evidence any document that the following claimants/plaintiffs had in their possession on or before September 24, 2001, or which they could have obtained by reasonable investigation, that fall within the definition of documents requested in the subpoenas: Stefanie Bistline; Rory Kip DeRouen; Michael Jordan; Christopher McCullough; Eric Fillmore; Tim Hedding; John Seale; Mathew Jarame Ell; Chris Wing; Ken Ford; John Caprai; Shelly Dyer; and John Kurtin.

IT IS FURTHER ORDERED, that the motion is further granted to the extent that it seeks from plaintiffs' counsel the attorney fees and costs incurred by Micron in (1) preparing its motion to strike consents and dismiss opt-in claimants; (2), preparing the briefs and affidavits

accompanying that motion; and (3) attending the hearing on the motion. Micron shall submit its petition for these fees within ten days from the date of this order.

IT IS FURTHER ORDERED, that the motion is denied in all other respects.

Dated this 15TH day of February, 2002.

B. LYNN WINMILL
CHIEF JUDGE, UNITED STATES DISTRICT COURT

dkh

United States District Court
for the
District of Idaho
February 19, 2002

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 1:01-cv-00244

I certify that a copy of the attached document was mailed or faxed to the following named persons:

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Cameron S. Burke, Clerk

Date: 2-19-02

BY: _____
(Deputy Clerk)